

COURT OF APPEALS  
DIVISION TWO

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STATE OF WASHINGTON  
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DEPUTY

**NO. 42265-4-II**

**COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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**TAMARA FRIZZELL,**

**Appellant,**

**v.**

**BARBARA MURRAY and GREGORY MURRAY,**

**Respondents.**

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

The respondents' case is conceptually very simple. Respondents maintain that this loan was a commercial loan, because that is what the documents say, that is what the deposition testimony of Tamara Frizzell indicates, and she actually used the loan proceeds for commercial purposes. Since it was a commercial loan, respondents assert, the exception to waiver in RCW 61.24.127 does not apply (RB 13). And because Tamara Frizzell did not actually restrain the trustee sale, she waived all claims against the respondents, not just those relating to the note and deed of trust, relying on the three cases cited in respondents' brief.

The respondents make four major errors:

(1) respondents assume that Tamara Frizzell's competency is irrelevant. Yet all of the documents she signed and all of her deposition testimony must be evaluated within the lens of her competency level.

(2) respondents assume that the purpose of the "loan" can be determined solely from the face of the documents that Tamara Frizzell signed, her deposition transcript, and her actual use of the funds, irrespective of her competency in understanding the documents, her manner of testifying at her deposition, and whether respondents created sham documents to circumvent the protection of various consumer statutes.

(3) respondents assume that the requirement of actually obtaining an

order enjoining a trustee sale flows inexorably from dicta in *Plein* and *Brown*, while the present case is actually one of first impression. In none of the cases appellant has found, and in none of the cases cited by respondents, did a borrower actually make a motion before the trustee sale to enjoin the sale. Language in an opinion going beyond the specific facts of the case is obviously dictum, and is not binding on other courts faced with a different factual situation.

(4) respondents ignore the constitutional limitations on barring a plaintiff from even asserting a claim in court, unless the plaintiff pays large sums of money for a bond or other security. The Washington Consumer Protection Act has never before been held to be so limited. A potential plaintiff obtaining a fee waiver under GR 34 could theoretically file a lawsuit alleging a CPA claim without paying any money at all. Yet in the context of a deed of trust sale, respondents maintain that a grantor of a deed of trust asserting a CPA claim against his or her lender must pay for a bond to enjoin the sale, or forego the ability to pursue any CPA claim. It makes no sense to permit predatory lenders to enjoy the advantages of such impediments so as to avoid being held accountable for their conduct.

## II. REPLY TO RESPONDENT'S ARGUMENT

Appellant replies to respondents' arguments as follows:

### **1. Whether Tamara Frizzell Is Competent or Not is a Key Factor in This Case and One Upon Which Reasonable Minds Could Reach Different Conclusions.**

Respondents assert that they do not address the competency issue, because the trial court did not address such issue (RB 19, fn 105). This argument makes little sense.

Tamara Frizzell raised the competency issue in her opposition to respondents' motion for summary judgment (CP 190-91). She raised that issue in her opening brief (AB 14-17). She submitted to the trial court the declaration of Dr. Mark Whitehill, a forensic psychologist, in support of her position (CP 196-97). Respondents cite no authority for the proposition that the trial court can simply ignore an issue raised by one of the parties. The trial court implicitly must have determined that the competency issue was either irrelevant, or that there was no factual dispute regarding Tamara Frizzell's competency.<sup>1</sup>

This was error. The competency issue is clearly relevant. If Tamara

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<sup>1</sup>It is possible that there was oversight on the part of the trial court. The order granting summary judgment does not recite the fact that the declaration of Dr. Whitehill was considered by the court (CP 304-305). The declaration was certainly submitted to the court and should have been considered.

Frizzell did not understand the nature and effect of the transaction, she clearly could not be held accountable for all the language in the documents she signed. The deed of trust and note would not be enforceable against her. See, *Hauer v. Union State Bank of Wautoma*, 192 Wis.2d 576, 588-89, 532 N.W.2d 456 (Wis.App. 1995) (“an incompetent person’s transactions are voidable . . .”).

Nor could it be said that Tamara Frizzell’s evidence of her incompetency was insufficient for a reasonable trier of fact to conclude that she was incompetent (AB 14-17). Respondents attempt to overcome this evidence by pointing out the wording contained in many documents that this was a business loan (RB 10-12). However, as noted above, if Tamara Frizzell was not competent, then the documents containing her signature are not enforceable against her. If Tamara Frizzell was not competent to understand the nature and effect of the loan transaction, she was not competent to understand whether it was a business loan or consumer loan.

Respondents further assert that Tamara Frizzell’s testimony at her own deposition demonstrates that this was a business loan (RB 12). Respondents cite several passages in the deposition referring to the loan as a business loan (RB 12, fn. 76). But on a motion for summary judgment, the court cannot assess the competency of a witness by merely reading the words in the deposition transcript. The witness’s mannerisms, demeanor, facial

expressions, body language and other factors not appearing in the transcript are crucial in the overall evaluation of the witness in connection with determining the witness's competency. For example, respondents do not cite the following passage in Tamara Frizzell's deposition regarding a business loan:

- Q Right after that, it says "for a business loan."  
What business was this for?
- A. Where does it say that?
- Q. Right after "closing charges," it says "for a business loan."  
What business is it referring to?
- A. You need to ask Doug.
- Q. Well, what do you think that word "business" refers to?
- A I can't say, because I don't understand what went on.

(CP 259).

In another example, respondents refer to CP 260 as establishing the business character of the loan (RB 12, fn 76). That passage in Tamara Frizzell's deposition was as follows:

- Q Ma'am, the next thing I'm going to talk about is this block here.  
At the top, it says "Debit and Credit."
- A Okay.
- Q What does that "credit" mean?  
Right below that, it says a hundred thousand dollars. Do you know what this hundred thousand dollars on this page refers to?
- A The business loan.

(CP 260).

The transcript does not reveal on its face that (1) respondents' counsel was showing Tamara Frizzell Ex. 6 (the final closing statement (CP 290)), (2) he was referring to the loan amount as a "credit" of \$100,000, and (3) when he asked Tamara Frizzell what the \$100,000 referred to, she was reading the words "business loan" from the line above the \$100,000 credit shown on Ex. 6. Her mere answer of "the business loan" does not establish that she even knew what that meant or whether she had a vacant stare on her face when she said it.

Respondents' counsel asked Tamara Frizzell a little later in the deposition, "Did you believe you were the – you were borrowing these funds from the Murrays?" Her reply was "I'm not sure" (CP 262). Again, the trial court could not observe the manner in which this question was answered, but even taking the answer at face value, if Tamara Frizzell did not understand that she was borrowing funds from the respondents (the Murrays), she clearly did not understand the nature and effect of the transaction.

Moreover, the respondents fail to address the issue of why a reasonable fact finder could not accept the testimony of Doug Baer, who stated in his declaration that Tamara was not good at financial matters, did not understand them, was unable to handle money, is like a child in that regard, and he did not believe that she understood the nature or effect of the transaction she was entering into (CP 146). If this testimony is believed, then

Tamara Frizzell was not competent at the time the transaction was entered into, and it was voidable. *Restatement (Second) of the Law of Contracts* § 15, comment d (1979). It is obviously not the function of the trial court to weigh the evidence for and against Tamara's Frizzell's competency, as all reasonable inferences in a motion for summary judgment are made in favor of the non-moving party, here Tamara Frizzell (AB 14). There certainly are reasonable inferences that Tamara Frizzell did not understand the nature or effect of the transaction.

Respondents also argue that because the "loan" proceeds were actually used to invest in securities, that also establishes the commercial purpose of the loan (RB 13). This argument is misplaced. Private individuals frequently purchase securities in the stock market as a form of investment, saving for retirement, funding college educations for their children, etc. It cannot be said that these are commercial activities. Rather, personal investing is a common component of personal or family activities, the hallmark of a consumer loan. Respondents certainly cite no authority for the proposition that purchasing stocks is *per se* a commercial activity.

Moreover, it is worth noting that Doug Baer told respondents that Tamara was not good in financial matters, did not understand them and was unable to handle money (CP 146). This statement, coupled with the proposed use of a power of attorney, should have alerted respondents to delving deeper

into Tamara Frizzell's capacity. In the very brief time they interacted with Tamara Frizzell at the closing and the little conversation they had with her then, they would have no basis to assess her competency. But they certainly could have investigated or inquired more. The fact that they did not do so is further evidence that they did not really care about repayment of this "loan," for they knew they were really purchasing Tamara Frizzell's property, and at less than half its value.

The *Restatement* also takes the position that an alternative way of showing lack of competence is to show that a person "is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition." *Restatement (Second) of Contracts* § 15 (1)(b). A key component under this test is whether the other party "had reason to know" of the incompetent person's condition. Here that alternative test is satisfied, as respondents were aware of facts which would have put a reasonable person on notice that further inquiry should be made (CP 146).

Respondents argue that Tamara Frizzell did not raise the issue of her lack of competency in her previous bankruptcy filing (RB 8). This is irrelevant. There is no requirement that a debtor filing bankruptcy either allege or prove competency. *In re Meyers*, 350 B.R. 760 (Bankr. N.D. Ohio 2006). There the court stated that "[a]lthough there is not a great deal of case law on this point, the courts agree that there is no requirement in the

Bankruptcy Code for a debtor to be mentally competent.” In *In re Zawisza*, 73 B.R. 929 (Bankr.E.D.Pa. 1987) the court held:

There is no explicit requirement in 11 U.S.C. § 109(e) or anywhere else in the Code that an individual filing a Chapter 13 Petition be competent; it states merely that an individual who meets certain other requirements may be a debtor. We are very reluctant to add to the Code requirements for filing which simply are not there.

*In re Zawisza, supra*. Thus it is not surprising that the competency issue did not arise in Frizzell’s bankruptcy case: there is simply no requirement that the debtor be competent.

Similarly, the respondents argue that Tamara Frizzell did not dispute the validity of the note or deed of trust in her bankruptcy case (RB 8). While that is technically true, it is equally irrelevant. While Tamara Frizzell could have filed an adversary action in her bankruptcy case to challenge the validity of the note and deed of trust, she and her counsel chose to let the bankruptcy case be dismissed. There was accordingly no platform in the bankruptcy case upon which to challenge the validity of the note and deed of trust. Tamara Frizzell and her counsel chose to challenge the validity of the note and deed of trust in the present lawsuit. Respondents make no argument that Frizzell as a *pro se* chapter 13 filer was required to challenge the note and deed of trust in her bankruptcy case, or that she somehow waived the ability to challenge the validity of the note and deed of trust in a subsequent state court

lawsuit, as she is now doing.

Respondents also argue that Tamara Frizzell filed nine pleadings in her bankruptcy action (RB 7-8), as though that somehow establishes her competence as a master litigator. However, the bottom line is that Tamara Frizzell did not qualify for a chapter 13 filing, as she had no regular source of income. She could not fund any kind of plan. Nor have respondents established that Tamara Frizzell filed her paperwork correctly, or by herself without the assistance of friends and family. It does not take nine pleadings to maintain a chapter 13 bankruptcy, and the necessity for the numerous filings lends support to the conclusion that Tamara Frizzell did not know what she was doing.

**2. Requiring Security to Restrain a Foreclosure Sale Is Different From Requiring Security to Maintain an Action for Violation of the CPA or Other Consumer Protection Statutes.**

Respondents argue that Tamara Frizzell was required to post security to enjoin the foreclosure sale pursuant to RCW 61.24.130(1) and CR 65(c), and failing to post the required security (or by failing to appeal or request reconsideration of the order requiring the posting of security), she failed to restrain the sale, and thus waived the right to proceed against the respondents under any legal theory (RB 8, 16). The effect of this argument is to impermissibly condition a plaintiff's right to access to the courts on the

payment of relatively large sums of money, which impecunious litigants obviously cannot afford.

It is one thing to require a bond or security to obtain a preliminary injunction. It is quite another to require a bond or security before a plaintiff may pursue a CPA claim, or violations of consumer protection statutes. Respondents do not rebut or even address the obvious constitutional issues their position raises (AB 23-24). Nor is there a necessity for the Court to endorse such a position. If a lender forecloses upon property, and the borrower is financially unable to enjoin the sale because he or she cannot post the security required, the lender will have all it is entitled to, i.e., its security to apply to or satisfy the debt. But there is no sound reason to strip the borrower of other avenues of compensation if the lender has violated various consumer protection statutes. This lessens the effect, if not defeats the purpose, of many of these consumer protection statutes. A lender should not be essentially immune from suit because the borrowers do not have the financial resources to obtain an injunction.

Respondents make much of the fact that Tamara Frizzell did not appeal the trial court's order requiring the posting of security, nor did she request reconsideration of that order (RB 8, 16). Those arguments mean nothing. She did not request reconsideration because the sale was scheduled to take place the next day, and it is not likely that the court issuing an order

one day will change its mind the next, even if Tamara Frizzell could have gotten a ruling on a motion for reconsideration before the sale took place the next day.

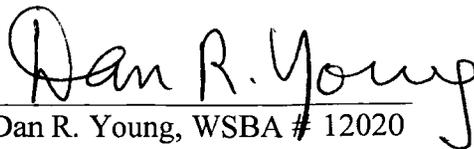
In addition, Tamara Frizzell did not appeal the order because it would have been an interlocutory appeal, and in order to stay enforcement of it pending appeal (assuming this Court accepted discretionary review), she would have had to post security to supersede the judgment under RAP 8.1(b). If Tamara Frizzell did not have sufficient funds to post security to enjoin the trustee sale, she clearly did not have sufficient funds to supersede the order pending appeal.

### III. CONCLUSION

Because there are disputed factual issues regarding Tamara Frizzell's competency, and the trial court misconstrued the waiver doctrine, this Court should reverse the trial court's order granting summary judgment in favor of respondents, and remand the case for trial.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of December, 2011.

**Law Offices of Dan R. Young**

By   
Dan R. Young, WSBA # 12020  
Attorney for Appellant  
Tamara Frizzell

DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the appellant Tamara Frizzell in this action.
2. On December 18, 2011, I sent by the USPS, first class mail with pre-paid postage

affixed, a copy of the foregoing Designation of Clerk's Papers to the following:

Darren Krattli, Esq.  
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Dated: December 18, 2011, at Seattle, Washington.

Dan R. Young  
Dan R. Young

BY \_\_\_\_\_  
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